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PATENT & TRADEMARK OFFICE

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant : Dan Galai et al.
Serial No. : 10/753,131
Filed : January 7, 2004
Title : DIVERSIFICATION OF RISK FOR ARTISTS AND INVESTORS

Art Unit : 3624
Examiner : Lalita M. Hamilton

**Mail Stop Appeal Brief - Patents**
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

## BRIEF ON APPEAL

### (1) Real Party in Interest

The real party in interest is MutualArt Inc., the assignee of the pending application.

### (2) Related Appeals and Interferences

None.

### (3) Status of Claims

Claims 1-26 stand rejected.

Applicant appeals the rejections of claims 1-26.

### (4) Status of Amendments

The Advisory Action of June 27, 2005 did not enter the amendments to dependent claims 25 and 26. The proposed amendments simply re-wrote dependent claims 25 and 26 in independent form.

An Amendment accompanies this Appeal Brief and re-writes dependent claims 25 and 26 in independent form, as permitted under 37 C.F.R. §41.33(b)(2). Applicant requests entry of

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those amendments because the grounds of rejection of claims 25 and 26 are different from those of claim 1.

### (5) Summary of Claimed Subject Matter

The employment patterns of artists typically have not lent themselves to pension or other retirement plans because artists often do not work full-time and, therefore, are not eligible for pension benefits provided to full-time employees. Furthermore, although *investors* in works of art may be able to reduce their risk by investing in a diverse art portfolio, the artists themselves generally bear the full risk of their own personal success.

The present invention may allow an artist to diversify her risk by pooling her artistic creations with other artists' works of art. In particular, an artist may reduce the risk of failure because the amount of her share in revenues from the works of art does not depend solely on the commercial success of the particular works of art contributed by her, but, instead, on the likelihood that <u>collectively</u>, the works of art contributed by all the artists will be successfully commercialized.

Independent claim1, for example, recites, in part:

> accepting from <u>each of a plurality of artists</u> one or more works of art to be pooled in a collective investment fund;
>
> * * *
>
> distributing a portion of the revenues among the artists, . . . <u>wherein each particular artist</u> . . . is entitled to receive an amount of the revenues based on the <u>collective commercial success of the works of art contributed to the fund by all the artists</u>.

FIGS. 2A-2B are a flow chart illustrating an example of certain features of the method.

Similarly, independent claim 15 recites, in part, a computer system adapted to cause the distribution of a portion of the revenues among the artists, "wherein each particular artist . . . is entitled to receive an amount of the revenues based on the collective commercial success of the works of art contributed to the fund by all the artists." FIG. 3 is a block diagram illustrating an example of certain features of the system.

Thus, the claimed subject matter envisions two or more artists, each of whom contributes at least one work of art to a collective investment fund. The amount of revenue distributed to each particular artist depends, at least in part, on the collective commercial success of all the artists in the fund. As explained in the pending Specification:

> In general, an artist who holds one or more financial instruments may be entitled to a dividend in an amount that is not linked specifically to the artworks that he contributed or for which he received the financial instrument. Instead, the amount of the dividend is based on revenues obtained by the fund from the successful commercialization of the entire pool of artworks in the fund. Therefore, an artist who contributed artworks to the fund, but whose artworks turned out to be commercially unsuccessful, would still be entitled to a dividend.

(Page 14, line 23 – page 15, line 9) As further explained:

> [W]hereas in contemporary practice artists rely on their own individual merits to succeed, by pooling their artworks the artists may diversify their risk of failure. If a particular artist's artworks turn out to be commercially unsuccessful, the artist still may obtain benefits from the success of the other artists' artworks pooled in the fund. As noted above, as least some of the dividends disbursed among holders of the financial instruments are linked to the combined success in commercializing the pool of artworks in the fund, instead of being linked to the individual artist's artworks.

(Page 16, lines 11-21)

Claims 25 and 26, which by the accompanying Amendment have been rewritten in independent form, include the features of claim 1 and further recite, respectively, that the portion of the revenues is distributed electronically among the artists participating in the fund and that the method includes automated transfer of the portion of the revenues among the artists participating in the fund.

## (6) Grounds of Rejection

(A) In the final Office action, claims 1-26 were rejected under 35 U.S.C. § 103 as unpatentable over U.S. Patent Application No. 2004/0015427 (Camelio) in view of U.S. Patent Application No. 2002/0156709 (Andrus).

(B) In the final Office action, claims 1-14 were rejected as directed to non-statutory subject matter under 35 U.S.C. § 101.

## (7) Argument

### (A) <u>The rejections of claims 1-26 under 35 U.S.C. § 103 should be reversed</u>

<u>The Law of Obviousness</u>

A claimed invention is unpatentable due to obviousness if the differences between it and the prior art "are such that the subject matter as a whole would have been obvious at the time the invention was made to a person of ordinary skill in the art." 35 U.S.C. § 103(a).

As discussed by the Court of Appeals for the Federal Circuit, a proper conclusion of obviousness under 35 U.S.C. § 103 requires that there be some motivation in the prior art that suggests the claimed invention as a whole:

> [A]n Examiner may often find every element of a claimed invention in the prior art. If identification of each claimed element in the prior art were sufficient to negate patentability, very few patents would ever issue. Furthermore, rejecting patents solely by finding prior art corollaries for the claimed elements would permit an examiner to use the claimed invention itself as a blueprint for piecing together elements in the prior art to defeat the patentablity of the claimed invention. Such an approach would be "an illogical and inappropriate process by which to determine patentablity." [Citations omitted] To prevent the use of hindsight based on the invention to defeat patentablity of the invention, this court requires the examiner to

> show motivation to combine the references that create the case of obviousness.

*In re Rouffet*, 149 F.3d 1350, 1357, 47 USPQ2d 1453, 1457-1458 (Fed. Cir. 1998). As further explained by the Federal Circuit:

> Our case law makes clear that the best defense against hindsight-based obviousness analysis is the rigorous application of the requirement for a showing of a teaching or motivation to combine the prior art references. See Dembiczak, 175 F.3d at 999, 50 USPQ2d at 1617. "Combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability--the essence of hindsight." Id.
>
> "When a rejection depends on a combination of prior art references, there must be some teaching, suggestion, or motivation to combine the references." In re Rouffet, 149 F.3d 1350, 1355, 47 USPQ2d 1453, 1456 (Fed. Cir. 1998) (citing In re Geiger, 815 F.2d 686, 688, 2 USPQ2d 1276, 1278 (Fed. Cir. 1987)).

*Ecolochem, Inc. v. Southern California Edison Co.*, 227 F.3d 1361, 1371-72, 56 USPQ2d 1065, 1072-73 (Fed. Cir. 2000).

Furthermore, the showing of the motivation to combine must be "clear and particular." *See, e.g., C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1352, 48 USPQ2d 1225, 1232 (Fed. Cir. 1998); *Teleflex, Inc. v. Ficosa North Am. Corp.*, 299 F.3d 1313, 1334, 63 USPQ2d 1374, 1387 (Fed. Cir. 2002).

Claims 1-26 are patentable over the Camelio patent in view of the Andrus application

In contrast to the pending claims, the Camelio patent application discloses a system and technique in which a single artist or artistic entity markets or solicits funding for its own art projects. A released project may be added to a "pool" of creative works (par. [0116]). However, regardless of how many projects or creative works are marketed or for which funding is solicited, all the projects and completed works are made by the same artistic entity.

In contrast to the pending claims, there is absolutely no disclosure or suggestion in the Camelio patent application of multiple artists each of whom contributes one or more works of art to a collective fund. Nor is there any suggestion of distributing revenues based on the collective commercial success of the works of art contributed to the fund separately by all the artists.

The Office action points to paragraph [0075] of the Camelio patent application, which discloses the possibility that one artist will advertise or recommend another artist in exchange for a percentage of each sale generated by the advertisement or recommendation. Paragraph [0075] of the Camelio application reads as follows:

> In some related embodiments of Group I, a system and method for lesser-known artists or artists of different genres for increasing their exposure is provided. This allows the lesser-known artist or an artist of a different genre to build a larger fan base. Specifically, this embodiment may allow an artist of any level or genre (preferably artists of a higher or more diverse profile) to advertise or recommend on a home page of the artist (or other web page) another artist to their existing fan base in exchange for a percentage of each sale generated by the recommendation. The sales are tracked by one or more variables contained in one or more links to the associated artist. Thus, any artist big or small can enjoy increased exposure and/or revenue by advertising or recommending fellow artists from any genre and collecting referral fees for each sale generated through the system.

Such an arrangement is a *one-way* arrangement in which the artist advertising or recommending the second artist may receive a percentage of the sales of the second artist's works. That, however, is significantly different from the subject matter of the pending claims. In particular, there is no suggestion of a collective fund in which works of art from both artists are pooled such that each artist obtains a portion of the revenues based on the collective commercial success of the works of art contributed to the fund by all the artists.

A person of ordinary skill would recognize that certain advantages may be obtained from the subject matter of the pending claims and that such advantages are not suggested by the Camelio patent application. For example, as explained above, the claimed technique and system of the present application may allow <u>each</u> artist to reduce his risk of failure because the amount of each artist's share in revenues from the works of art does not depend solely on the commercial success of the particular works of art contributed by that artist, but, instead, on the likelihood that collectively, the works of art contributed by all the artists will be successfully commercialized. The scenario disclosed by the Camelio patent application allows only the advertising or recommending artist to obtain certain referral fees at the expense of the second artist.

At least for the foregoing reasons, there is no disclosure or suggestion of the following features of independent claims 1, 25 and 26:

> "accepting from <u>each</u> <u>of a plurality of artists</u> one or more works of art to be pooled in a collective investment fund;
>
> * * *
>
> distributing a portion of the revenues among the artists participating in the fund according to vested interests in the financial instruments held by the artists, wherein <u>each particular artist</u> having a vested interest in one of the financial instruments <u>is entitled to receive an amount of the revenues based on the collective commercial success of the works of art contributed to the fund by all the artists</u>."

Similarly, at least for the foregoing reasons, there is no disclosure or suggestion of the following features of independent claim 15:

> "a first database storing information about <u>each of a plurality of artists</u> and about one or more works of art <u>accepted from each artist</u>, wherein the works of art are pooled in a collective investment fund;
>
> * * *
>
> a computer system coupled to each database, wherein the computer system is adapted to cause the distribution of a portion of the revenues among the artists participating in the fund according to vested interests in the financial instruments held by

the artists, wherein each particular artist having a vested interest in one of the financial instruments is entitled to receive an amount of the revenues based on the collective commercial success of the works of art contributed to the fund by all the artists."

The final Office action acknowledges (at page 4, lines 2-4) that the Camelio application does not disclose multiple artists sharing revenues based on the collective commercial success of the works of art. However, the Office action relies on the Andrus et al. application for its disclosure relating to equity interests and warrants and alleges that it would have been obvious to combine the Camelio and Andrus et al. applications to obtain the subject matter of the pending claims. The alleged motivation for combining the references according to the Patent and Trademark Office (*see* Office action of November 12, 2004 at page 6) is "to provide an additional entitlement/right to participants in exchange for their participation in the fund and to ensure an adequate return on their investment." As discussed below, that is incorrect.

The Andrus application discloses, *inter alia*, an investment company that receives funds from a unaffiliated capital markets investors. The investment company invests a substantial majority of the invested funds to operating companies for essentially unrestricted use by the operating companies. The investment company receives a security interest (*e.g.*, a warrant) in substantially all assets of the operating companies.

As explained above, the Camelio application discloses the a situation in which a first artist will advertise or recommend another artist on the first artist's web site in exchange for a percentage of each sale of the second artist's work generated by the advertisement or recommendation (*see* Camelio application, par. [0075], *quoted supra*).

Thus, according to the Camelio application, the purpose of the disclosed arrangement between the artists is to allow a first artist (*e.g.*, the artist with the higher or more diverse profile (page 4, par. [0075]) to obtain additional revenue through referral fees by advertising or recommending a second artist, and to allow the second artist (*e.g.*, a lesser-known artist) to receive increased exposure and to build a larger fan base. In other words, the Camelio application discloses a referral arrangement in which the motivations for both artists to participate are built into the disclosed arrangement: the first artist receives the possibility of increased revenue through referral fees *in exchange* for the second artist receiving increased

exposure to potential buyers. There would have been no need to provide further motivation for the second artist to participate in the arrangement by sharing in the commercial success of *all* the works of art.

To the contrary, allowing the second artist (*i.e.*, the lesser known artist) to receive a share of revenues generated by the works of the first artist would more likely have the undesired effect of *reducing* the first artist's motivation to participate in such an arrangement since the first artist would have to share a percentage of revenues generated through the sale of *his own* works.

Therefore, the fact that funds, equity interests and warrants were known from the Andrus et al. application is irrelevant. There would have been no "clear and particular" suggestion or motivation to use such concepts as disclosed in the Andrus application in combination with the disclosure of the Camelio application to obtain the subject matter of the pending claims.

Furthermore, claim 1 recites that a financial instrument is issued to each particular artist *in consideration for one or more works of art* contributed by that artist to the fund. As noted in applicant's previous reply, the Office action (November 12, 2004 at page 5) implicitly misconstrued that feature when it stated that "Camelio discloses that the participants are given entitlements/rights in exchange for their financing." (Underlining added) According to the Camelio application, the "participants" who receive such entitlements/rights are *not* artists who contribute works of art to a fund. Rather, they are persons who provide funding (*i.e.*, money) to the artist's projects or purchase certain specified rights in the artist's works of art:

> The computer system utilizing a client-server architecture, as outlined above, may be used in the embodiments of Group I to operate application software for presenting offers to users on a client computer, for entitlements and/or patronage levels from the artist *in exchange for capital for a project of the artist*. The capital may be used to fund the project, where the project may include one or more creative works of the artist (or other artists). Entitlements may be any product, service and/or benefit conferred from the artist or other party to the user.

(Par. [0087]; italics added) Even if some of the "participants" in the Camelio application also happened to be artists, that would be irrelevant. Such participants provide financing, not works of art as recited in the pending claims.

Therefore, even if there were some reason to combine the disclosures of the Camelio and Andrus et al. applications, at most that would suggest that a participant who provides *financial support* for an artist's project might receive an entitlement or right in the form of a warrant. Such participants who provide financial support are very different from artists who contribute works of art to a fund. For that additional reason, there is absolutely no motivation of the subject matter of the pending claims, including multiple artists each of whom contributes at least one work of art to a collective investment fund wherein the amount of revenue distributed to each particular artist depends, at least in part, on the collective commercial success of all the artists in the fund.

At least for the foregoing reasons, the cited references do not suggest the claimed subject matter of any of the pending claims as a whole. A contrary conclusion would be precisely the type of improper hindsight the courts have warned against.

The United States Supreme Court has recognized additional factors that should be considered in determining whether or not claimed subject matter is obvious under 35 U.S.C. § 103. The Supreme Court called those factors "secondary considerations." *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966), and other court opinions have called them "objective evidence of nonobviousness." *See, e.g., In re Rouffet*, 149 F.3d 1350, 1355, 47 USPQ2d 1453, 1456 (1998). Those factors include the presence of a long-felt but unmet need for the invention and commercial success of the invention. *Id.*

The Court of Appeals for the Federal Circuit has stated that evidence of secondary considerations must always be considered – even at the examination stage before the Patent and Trademark Office. *In re Sernaker*, 702 F.2d 989, 996, 217 USPQ 1, 7 (Fed. Cir. 1983).

In a previous reply (June 2005) to an Office action, applicant submitted copies of several published articles that relate to the Artist Pension Trust (APT) launched by MutualArt, Inc., the assignee of the pending patent application. The APT is based upon ideas disclosed and claimed in the pending application. Copies of the following representative published articles, which were previously made of record, are enclosed in the attached Evidence Appendix:

(1) "Wall Street Lends Its Style to Artists in Need of Funds," The Washington Post, June 30, 2004 (Exhibit 1).

(2) "What's Hot Now: A Pension Scheme for Artists," Forbes, August 19, 2004 (Exhibit 2).

(3) "Art for money's sake," Finance & Economics, May 27, 2004 (Exhibit 3).

(4) "Artists turn work into pensions," BBC news, April 18, 2005 (Exhibit 4).

(5) "Artful scheme to draw a pension," The Herald, June 5, 2005 (Exhibit 5).

(6) "A Retirement Plan for Artists," Art in America, September 1, 2004 (Exhibit 6).

In addition, the following articles are submitted:

(7) "The Best of What's New," BusinessWeek Online, October 11, 2004, and Business Week, 75th Anniversary Issue, "The Innovation Economy, Special Report: The technologies and new ideas that are changing the world," October 11, 2004 (Exhibit 7).

(8) "New Pension Fund Seeks to Give Struggling Artists a Taste of Long-Term Stability," New York Times, July 20, 2004 (Exhibit 8).

The foregoing evidence supports the conclusion that the subject matter claimed in the pending application would not have been obvious.

Exhibit 1 (page 2), for example, refers to the fund as "a <u>first-of-its kind</u> pension fund for visual artists." As explained in that article:

> MutualArt Inc. has established a first-of-its-kind pension fund for visual artists. [T]he trust is designed to eventually include 250 promising artists, each of whom must agree to contribute 20 works to the trust over 20 years. The works will be held for eventual sale, if and when they appreciate significantly in value.
>
> When an artist's work is sold, the trust will credit 50 percent of the proceeds to the artist's individual retirement account. The rest will go into a pool for all participating artists, . . .

Another one of the articles recognizes that the pension fund for visual artists "<u>certainly fills a gap</u>." (Exhibit 3) An article in BusinessWeek Online highlights the artists' pension fund in an article entitled "The <u>Best</u> of What's <u>New</u>." (Exhibit 7) (Underscoring added) The artists' pension fund also is mentioned in Business Week's 75th Anniversary Issue, entitled "The

Innovation Economy, Special Report: The technologies and new ideas that are changing the world" (Exhibit 7).

An individual who served as the former curator of Scotland's first independent show at the Venice Biennale and is involved in the APT explained that the fund "would bring a semblance of stability to the often shaky finances of professional artists and would also enable artists to receive some compensation when the value of their art rises over time." (Exhibit 5, page 1). That same individual observed that the "trust seems like a long overdue idea." (Exhibit 4) Even The New York Times published an article about the artists' pension fund. (Exhibit 8) That article emphasizes how the artists' pension fund addresses the long-felt, but unfulfilled, need of giving struggling artists the possibility of long-term financial stability.

Furthermore, in addition to artists, individuals with significant experience in the world of art are participating in the APT (*see, e.g.*, exhibits 1 and 6). For example, exhibit 1 (page 2) indicates that a former director of the San Francisco Museum of Modern Art and the Whitney Museum of American Art in New York is involved in the APT and apparently was "surprised no one had come up with the idea sooner." The APT also has received financial backing from third parties (*see* exhibit 2, page 1).

The foregoing information is objective evidence of non-obviousness and indicates that the subject matter of the pending claims addresses a long-felt but unmet need for the invention. The involvement in the APT of persons with experience in the art world, as well as the participation of artists and the financial backing of investors, is indicative of the commercial success of the invention.

For those additional reasons, the rejections of claims 1-26 as obvious under 35 U.S.C. § 103 should be reversed.

**(B) <u>The rejections of claims 1-14 under 35 U.S.C. § 101 should be reversed</u>**

The Office action rejected the method claims (1-14) as directed to non-statutory subject matter because they allegedly "do not claim a technological basis in the preamble and body of the claim" and because they allegedly could be interpreted to involve "no more than a manipulation of an abstract idea."

The Patent statute broadly states what inventions are patentable:

> Whoever invents or discovers <u>any</u> new and useful <u>process</u>, . . . or any new and useful improvement thereof, may obtain a patent therefore, . . .

35 U.S.C. § 101. The Patent statute broadly defines "process" to mean "process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter or material. 35 U.S.C. § 100(b).

There is no statutory basis in the Patent statute for requiring that the subject matter of the claims have a "technological basis." Nor is the undersigned aware of any judicial precedent for such a requirement. Instead, the Supreme Court has identified the following areas of subject matter that are unpatentable: laws of nature, natural phenomena, and abstract ideas. *See, e.g., State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368, 47 USPQ2d 1596 (Fed. Cir. 1998) (citing Supreme Court decisions). As explained by the Federal Circuit based on Supreme Court precedent:

> The repetitive use of the expansive term "any" in § 101 shows Congress's intent not to place any restrictions in the subject matter for which a patent may be obtained beyond those specifically recited in § 101.

*Id.* Therefore, the Patent Office's attempt to place the additional requirement of "technological basis" on the type of subject matter considered to be statutory is contrary to the Patent statute, as well as contrary to the relevant case law. Instead:

> Since the 1952 Patent Act, business methods have been, and should have been, subject to the same legal requirements for patentability as applied to any other process or method."

*Id.*

Furthermore, the alleged requirement that, to be patentable, an invention must have a "technological basis" also has no support in the Constitution of the United States which gives the

U.S. Congress the broad power to issue patents for "discoveries" by inventors "to promote the progress of . . . the useful arts." U.S. Const., Article I, § 8, cl. 8. Even if the phrase "useful arts" were interpreted to mean "technological arts," (*see, e.g., In re Bergy*, 596 F.2d 952, 958, 201 USPQ 352, 359 (CCPA 1979)), that would merely indicate the *broad purpose* for which Congress may grant patents generally. It would not place a restriction on the subject matter that may be patentable. The subject matter of pending claims 1-14 certainly qualifies as "discoveries" and, in view of Congress' use of expansive language in 35 U.S.C. § 101, the subject matter of those claims is clearly statutory.

Applicant acknowledges that a process that merely manipulates an abstract idea may not be patentable. However, the Office action's statement that claims 1-14 "may be interpreted . . . as involving no more than a manipulation of an abstract idea" is incorrect. For example, independent claim 1 recites "accepting" works of art into a fund, "issuing" financial instruments, "generating" revenues and "distributing" revenues. Those are concrete actions that may have significant practical and legal ramifications; they are not merely the manipulation of an abstract idea or the manipulation of ideas by the human mind. A person of ordinary skill in the field would certainly not view those actions merely as abstract ideas taking place in the human mind.

In view of the foregoing, the rejections of claims 1-14 under section 101 should be reversed.

**Summary**

Applicant requests that the rejections of claims 1-26 under 35 U.S.C. § 103 and claims 1-14 under 35 U.S.C. § 101 be reversed and the claims allowed.

The brief fee of $250 is enclosed. Also enclosed is a check for the Petition for Extension of Time fee. Please apply any other charges or credits to Deposit Account No. 06-1050.

Respectfully submitted,

Date: 10/3/05

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## Appendix of Claims

1. A method for the diversification of risk in connection with works of art, the method comprising:

accepting from each of a plurality of artists one or more works of art to be pooled in a collective investment fund;

issuing a financial instrument to each particular artist in consideration for one or more works of art contributed by that artist to the fund;

generating revenues on behalf of the fund through commercialization of the works of art in the fund; and

distributing a portion of the revenues among the artists participating in the fund according to vested interests in the financial instruments held by the artists, wherein each particular artist having a vested interest in one of the financial instruments is entitled to receive an amount of the revenues based on the collective commercial success of the works of art contributed to the fund by all the artists.

2. The method of claim 1 including receiving works of art for the fund from each artist according to a predetermined schedule.

3. The method of claim 1 wherein the financial instrument comprises a warrant that may be exercised by the particular artist after a specified vesting period.

4. The method of claim 3 wherein the warrant may be exercised by the particular artist after the vesting period only if the artist is still participating in the fund.

5. The method of claim 4 wherein the artist is deemed to still be participating in the fund only if the artist has contributed works of art to the fund according to a specified schedule.

6. The method of claim 3 wherein, upon exercising the warrant, the artist is entitled to a specified portion of future revenues distributed by the fund.

7. The method of claim 1 wherein distribution of revenue to the artists begins only after a specified period since the fund opened.

8. The method of claim 1 wherein the financial instrument comprises an equity instrument that entitles the artist to a specified portion of future revenues distributed by the fund.

9. The method of claim 1 wherein the works of art comprise visual works of art.

10. The method of claim 1 including having each work of art reviewed by a committee to determine whether the work of art should be accepted into the fund.

11. The method of claim 1 including transferring ownership of the works of art to an entity that manages the fund.

12. The method of claim 1 including issuing financial instruments, each of which represents one or more shares in the fund, to one or more entities other than the artists participating in the fund, wherein each share entitles the entity owning the financial instrument to a specified amount of future revenue generated by the fund.

13. The method of claim 1 including selecting artists to participate in the collective investment fund.

14. The method of claim 1 wherein a particular artist having a vested interest in one of the financial instruments is further entitled to receive an amount of the revenues based on the commercial success of the works of art contributed to the fund by that particular artist.

15. A system for distributing revenues in connection with works of art comprising:

a first database storing information about each of a plurality of artists and about one or more works of art accepted from each artist, wherein the works of art are pooled in a collective investment fund;

a second database storing information about financial instruments issued to each of the artists in consideration for one or more works of art contributed by the artists to the fund;

a third database storing information about revenues obtained on behalf of the fund through commercialization of the works of art in the fund; and

a computer system coupled to each database, wherein the computer system is adapted to cause the distribution of a portion of the revenues among the artists participating in the fund according to vested interests in the financial instruments held by the artists, wherein each particular artist having a vested interest in one of the financial instruments is entitled to receive an amount of the revenues based on the collective commercial success of the works of art contributed to the fund by all the artists.

16. The system of claim 15 wherein the first database stores information about works of art received from each artist according to a predetermined schedule.

17. The system of claim 15 wherein each financial instrument comprises a warrant, and wherein the second database stores information about a vesting period after which the warrant may be exercised by a particular artist holding the warrant.

18. The system of claim 17 wherein the warrant may be exercised by the particular artist after the vesting period only if the particular artist is still participating in the fund.

19. The system of claim 18 wherein the artist is deemed to still be participating in the fund only if the particular artist has contributed works of art to the fund according to a specified schedule.

20. The system of claim 17 wherein the second database stores information about a specified portion of future revenues to be distributed by the fund to the particular artist upon exercising the warrant.

21. The system of claim 15 wherein the computer system is adapted to begin distribution of revenue to the artists only after a specified period since the fund opened.

22. The system of claim 15 wherein the second database stores information about financial instruments each of which comprises an equity instrument that entitles the artist to a specified portion of future revenues distributed by the fund.

23. The system of claim 15 wherein first database stores information about works of art that comprise visual works of art.

24. The system of claim 15 including a database that stores information about financial instruments, each of which represents one or more shares in the fund and which was issued to an entity other than an artist participating in the fund, wherein each share entitles the entity owning the financial instrument to a specified amount of future revenue generated by the fund.

25. A method for the diversification of risk in connection with works of art, the method comprising:

accepting from each of a plurality of artists one or more works of art to be pooled in a collective investment fund;

issuing a financial instrument to each particular artist in consideration for one or more works of art contributed by that artist to the fund;

generating revenues on behalf of the fund through commercialization of the works of art in the fund; and

distributing a portion of the revenues among the artists participating in the fund according to vested interests in the financial instruments held by the artists, wherein each particular artist having a vested interest in one of the financial instruments is entitled to receive an amount of the

revenues based on the collective commercial success of the works of art contributed to the fund by all the artists, wherein the portion of the revenues is distributed electronically among the artists participating in the fund.

26. A method for the diversification of risk in connection with works of art, the method comprising:

accepting from each of a plurality of artists one or more works of art to be pooled in a collective investment fund;

issuing a financial instrument to each particular artist in consideration for one or more works of art contributed by that artist to the fund;

generating revenues on behalf of the fund through commercialization of the works of art in the fund; and

distributing a portion of the revenues among the artists participating in the fund according to vested interests in the financial instruments held by the artists, wherein each particular artist having a vested interest in one of the financial instruments is entitled to receive an amount of the revenues based on the collective commercial success of the works of art contributed to the fund by all the artists,

wherein the method includes automated transfer of the portion of the revenues among the artists participating in the fund.

## Appendix of Evidence

In a previous reply (June 2005), Applicant's attorney submitted copies of the following published articles, which were made of record. A copy of each article is attached:

(1) "Wall Street Lends Its Style to Artists in Need of Funds," The Washington Post, June 30, 2004 (Exhibit 1).

(2) "What's Hot Now: A Pension Scheme for Artists," Forbes, August 19, 2004 (Exhibit 2).

(3) "Art for money's sake," Finance & Economics, May 27, 2004 (Exhibit 3).

(4) "Artists turn work into pensions," BBC news, April 18, 2005 (Exhibit 4).

(5) "Artful scheme to draw a pension," The Herald, June 5, 2005 (Exhibit 5).

(6) "A Retirement Plan for Artists," Art in America, September 1, 2004 (Exhibit 6).

The Office action of May 5, 2005 does not even attempt to address that evidence of non-obviousness, and the Advisory Action of June 27, 2005 fails to indicate whether the foregoing evidence, which was submitted in a timely manner, was entered.

In addition, copies of the following articles are attached:

(7) "The Best of What's New," BusinessWeek Online, October 11, 2004 and "Risk: A Scheme for Starving Artists to Hatch a Nourishing Nest Egg" in Business Week's 75$^{th}$ Anniversary Issue, "The Innovation Economy, Special Report: The technologies and new ideas that are changing the world" (Exhibit 7).

(8) "New Pension Fund Seeks to Give Struggling Artists a Taste of Long-Term Stability," The New York Times, July 20, 2004 (Exhibit 8).

The Washington Post

washingtonpost.com

# Wall Street Lends Its Style to Artists In Need of Funds
## Investors Ease the Struggle

By Ben White
Washington Post Staff Writer
Wednesday, June 30, 2004; Page A01

NEW YORK -- It was the biggest break of her career, an assignment to produce a sculpture big enough to fill 6,000 square feet of museum space, but artist Sharon Louden didn't have the $20,000 she needed to get the project started.

So Louden and her husband, Vinson Valega, a jazz musician and commodities trader, borrowed an idea from Wall Street.

They drew up a prospectus and began soliciting investors to buy shares in the sculpture, which would be put up for sale after its exhibition at the Kemper Museum of Contemporary Art in Kansas City, Mo.

Louden and Valega are part of a movement that gives new meaning to "the art of the deal" -- an effort to remove some of the struggle from the lives of struggling artists by harnessing techniques more familiar to Wall Street than New York's Museum Mile.

"We could have put it all on credit cards and gone into debt," said Valega, describing the financial style that frequently accompanies a life in the arts. "But I thought, this is going to be really valuable some day -- let's collateralize it."

Louden and Valega, both of whom grew up in Olney, called previous collectors of Louden's work, easily gathering enough money to complete the piece. This spring, she sold it to a corporate buyer, earning investors returns of between 50 and 75 percent. Investments ranged from $200 to several thousand dollars, and the minimum return anyone made was about $100.

The sculpture -- 850 miles of black and gray monofilament fishing line bundled into individual pieces meant to evoke a natural landscape -- belongs to auto insurance company Progressive Corp., which maintains a large contemporary art collection. Called "The Attenders," it hangs above the foyer of the company's call center in Phoenix.

"Some people like it, some hate it," Louden said of employee reaction. "But as long as it gets people talking, that's what matters."

Louden said that when she began telling investors about the size of their returns after the sculpture was sold, many begged her to keep the money for her next venture.

"They just freaked out," she said. Louden said she has been inundated with phone calls from investors

eager to get in on her next project and artists interested in her novel fundraising approach. She is getting ready to solicit a second round of investors for an ambitious animation project.

Instead of resigning themselves to living and dying in poverty, Louden and other artists are beginning to experiment with financial innovation, in some cases to find seed money for their work and in others to help provide financial stability for the future.

In New York, for instance, MutualArt Inc. has established a first-of-its-kind pension fund for visual artists. Launched this spring, the trust is designed to eventually include 250 promising artists, each of whom must agree to contribute 20 works to the trust over 20 years. The works will be held for eventual sale, if and when they appreciate significantly in value.

When an artist's work is sold, the trust will credit 50 percent of the proceeds to the artist's individual retirement account. The rest will go into a pool for all participating artists, with a cut going to cover administrative costs. After 20 years, artists will begin receiving income from the pool.

Sebastiaan Bremer, 34, a Brooklyn resident who etches intricate, ethereal drawings onto photographs, said he accepted an invitation to join the trust to ensure a more stable future for himself, his wife and their two young children.

Bremer supports his family with his work now, but said the fund will help reduce the risk associated with the shifting tastes of the contemporary art market, while perhaps helping put his kids through college.

"A lot of people have been talking about doing this sort of thing for many years," he said. "But it's hard for people to trust each other, particularly people as individually minded as artists. . . . I think it helped that it's being organized by such respected people."

One of those is David A. Ross, a former director of the San Francisco Museum of Modern Art and the Whitney Museum of American Art in New York. Ross, executive vice president of MutualArt, said he was surprised no one had come up with the idea sooner.

"We recognize that artists create an enormous amount of value for society," he said. "We wanted to find a way where artists could participate as a group in the value they are creating in the culture." Once the first fund reaches 250 members, organizers hope to start new funds in major cities around the world.

The idea for the trust is hardly a pie-in-the-sky scheme dreamed up by the financially naive. Its structure is in part the creation of Dan Galai, an Israeli academic who has taught at the University of Chicago and the University of California at Berkeley.

Pamela Auchincloss, director of the New York trust, said just one-half of 1 percent of the trust's membership would need to achieve significant commercial success to ensure a decent retirement package for all members. "It's designed in a highly conservative way," she said.

Both Auchincloss and Ross said they have received many inquiries about setting up similar trusts for other freelance fields. They said that as long as the discipline produces work that can increase in value over time and the process used to select participants is rigorous, the concept should translate to other media, including photography.

Julie Ward, an independent curator working on a book about patronage, described Louden's approach as a postmodern spin on a process that dates at least to the Medici family's support for the arts in 15th- and 16th-century Florence.

She said the multiple-investor approach could remove some potential drawbacks of more traditional patronage, in which an artist can become beholden to the tastes and whims of a single wealthy collector while having little control over the art's fate.

"Positive patronage creates good energy, good back and forth, between the artist, the patrons and the audience," she said. "As we went through the 20th century, patronage became more a matter of, 'I'll give you money, then I own [the work].' It got out of sync."

James McLaren, an investment banker who put money into "The Attenders," said he was attracted by the structure of the deal: If the piece had failed to sell, each investor would have received part of the sculpture, which could easily be broken into pieces. But he said the real reason he put up money was the thrill of helping an artist.

"To me there is a lot of psychic pleasure in trying to identify and support people who are in the earlier stages of their career," he said.

Louden said many of her investors had a similar reaction, at least in part because she began raising money not long after the Sept. 11, 2001, terrorist attack on the World Trade Center. The attack drove Louden and her husband out of their apartment in Lower Manhattan for two weeks and shuttered Louden's studio.

"I think after 9/11 it made people feel better to be involved in a project like this," she said. "People have mostly recovered from that time, but they still want [to invest] because of that creative feeling."

While Louden's approach appears fairly novel, the practice of "securitizing" art is not new. One of the most famous examples is the "Bowie Bond."

In 1997, pop star David Bowie considered selling his extensive catalog of previous albums. But with help from manager William Zysblat and financier David Pullman, Bowie decided instead to sell bonds backed by future revenue from his songs. The bond sale raised $55 million for Bowie and allowed him to retain control of his work.

Zysblat said that while the idea seemed exotic at the time, it was actually quite simple. Bowie's catalog had demonstrated consistent sales and predictable annual earnings, making the bonds a fairly low-risk investment. Bowie bonds carry a 7.9 percent interest rate and have never missed a payment. They are owned entirely by Prudential Insurance Co. and not publicly traded.

Pullman said that since 1997 he has successfully sold bonds backed by royalties from songs in the catalogs of Motown Records, James Brown, Ashford & Simpson and the Isley Brothers.

And the phenomenon could soon move beyond big bond sales designed for institutional investors. New York financier Robert D'Loren, who along with Pullman has arranged for companies to sell bonds backed by intellectual property, is preparing to sell stock to the public that will pay dividends based on royalties on such diverse things as song lyrics and hamburger recipes.

## What's Hot Now: A Pension Scheme For Artists

Forbes.com

**08/19/2004 , Forbes**

A new company called MutualArt has launched the Artist Pension Trust (APT), the first pension program for visual artists. The scheme offers emerging and mid-career artists a chance to place their works in a collective as an investment. The work will be held for up to two decades, then sold and a percentage of the proceeds will be paid into the retirement accounts of participating artists.

The company has ambitious plans to create a string of non-profit trusts around the world, beginning in New York then expanding to Los Angeles, London, Berlin, Beijing, Tokyo and Moscow. In the process, they say, they could create a billion-dollar empire controlling vast quantities of art.

MutualArt's principals are Israeli businessman Moti Shniberg, who founded the product-coding company Image ID; Hebrew University business professor Dan Galai, a specialist in risk diversification strategy who manages an Israeli hedge fund called Sigma; and David A. Ross, former director of the Whitney Museum and the San Francisco Museum of Modern Art.

Thus far, they have raised $2 million from Israeli and U.S. investors to get the program off the ground. MutualArt's advisory board includes artists John Baldessari and Kiki Smith, Columbia University School of the Arts dean Bruce W. Ferguson, Morgan Stanley (nyse: MWD - news - people ) Mergers & Acquisitions co-chairman Raymond McGuire, art historian Irving Sandler, and Wharton School of Business professor Jerry Wind.

Mr. Shniberg hatched the idea when he learned that financial insecurity was a common concern among young artists in the U.S., many of whom do not have the safety net of corporate retirement plans, do not enjoy the benefits of droit du suite and cannot deduct the fair market value of their work donated to charities.

"Artists create an enormous amount of wealth in their lives," observes Mr. Ross, "and this program is designed to allow them to participate in this wealth."

Here is how it works: Mr. Ross and advisors will create a series of regional trusts, each with a director and selection committee who will invite 250 artists to join the scheme. Each artist will agree to invest 20 works of art over a 20-year period, according to a prescribed schedule. The works will be held by the trust in open storage, available for loan to museums and galleries and included in trust-initiated exhibitions and publications intended to advance the artists' careers.

A sales team--yet to be assembled--will sell the works when they believe they can achieve the highest returns, working with each artist's gallery or through private-treaty sales, auctions and secondary-market dealers. Revenues will be divided as follows: 40% will go into the artist's individual retirement account, 40% will go into a group fund shared equally by the 250 members of the trust, and 20% will go to MutualArt which bears all costs of storing, insuring and managing the program.

Works without market value will be returned to the artist, agent or heirs or donated to a non-profit institution. The funds realized will be managed by an investment firm, and each artist will have control over how his or her money is invested. Artists will start to receive income 20 years after the inception of their trust.

"If two artists out of 250 achieve serious 'Chuck Close-level' success, that particular regional trust will have enough funds to succeed," says Mr. Ross, "But we feel fairly confident that our success rate will probably be more in the neighborhood of 5% and could be as high as 10%."

Star artists will subsidize less successful ones, but by allocating half of the proceeds for sales to each artist's own account, the program also rewards members according to their market success.

As director of the New York trust, Mr. Ross has hired art consultant and gallerist Pamela Auchincloss and appointed a selection committee that includes himself, curator Clarissa Dalrymple and dealers Jeffrey Deitch, Jack Tilton and Simon Watson. They set up the New York trust quietly in December and have just announced the first two dozen artist members, including Chris Mir, Lamar Peterson and Chloe Piene, whose drawings were included in the recent Whitney Biennial. Mr. Ross intends to add 50 artists per year until he reaches 250.

**Artists' pensions**

# Art for money's sake

May 27th 2004
From The Economist print edition

**A new retirement scheme for artists, with a twist**

FROM Vincent van Gogh to Henri Rousseau, artists have a long and honourable tradition of dying penniless. Their modern counterparts would rather not. This week MutualArt, a New York-based group of academics and museum experts, announced the start of the first-ever pension trust for visual artists. There is a twist: the contributions of those invited to join the scheme will be in the form of paintings and sculptures—20 works over 20 years. Their sale is supposed to provide each artist with three decades of retirement payouts.

The scheme certainly fills a gap. Artists are even worse off than actors, says Andras Szanto of the National Arts Journalism programme at Columbia University. Actors can get access to pensions through unions. Artists usually fall outside traditional retirement schemes because they rarely stay with a single gallery or dealer for very long. Most rely on teaching, day jobs or rich spouses in their dotage.

But investing in art is risky even if you know a thing or two about it. For every Jasper Johns, whose paintings of flags and symbols command top prices at auctions, there are dozens whose flags, for some reason, do not. The trusts' organisers are trying to reduce the risk of flops by allowing only promising artists—whose work is already selling—to join. Membership will be capped at 250 per trust (the first, in New York, has so far signed up 19). Each artist's payout will come half from the pooled sale of works, and half from sales of his own work, so nobody will get a free ride. Once the works are sold, the proceeds will be invested in securities chosen by the artists.

There are costs—the works must be stored or exhibited, new applicants to the trust need to be screened and so on. Dan Galai, an Israeli academic who helped found MutualArt, says all this should cost each trust about $250,000 a year. MutualArt will pay half such costs after taking a 20% cut from the sale of each work of art, which is where it makes its money.

British Rail famously invested some of its pension scheme in Old Masters and other classics in the 1970s. The art brought a decent enough return of 4% above inflation. But it sold its last work in 2003 in part because prices for art had become so high. To enjoy a prosperous old age, the artists signing up must hope they stay that way—and that one at least of their number gets more recognition than Van Gogh ever did before he died.

## Artists turn works into pensions

**A pension scheme has been set up to help artists to save while in the early stages of their career.**

BBC NEWS

**04/18/2005 , BBC News UK Edition**

The Artists Pension Trust enables artists to save works rather than money, in the hope they will increase in value.

Each artist will invest 20 works over a 20-year period, with net profits from future sales of the work directed straight back to the artist.

The works will still be available for viewing, lending and showing.

**Strong collection**

The trust will consist of 250 artists, selected at the rate of about 50 per year over five years.

Trust director Kay Pallister said: "The contemporary art world is a fast-paced field, exhibitions last a few weeks and the turnover of art works continues to accelerate, making it very difficult for artists to hold on to even one or two works per year.

"I know many artists who have sold every artwork, early on in their careers, for prices in the region of £1,000 to £5,000 and then their profile has grown. Those formative works are re-sold for fifty times that amount without the artist seeing a penny of that appreciation."

She added: "The trust seems like a long overdue idea. In the short term, emerging artists can benefit from being part of a strong collection, that will build over time to be of true significance in its own right.

"More importantly they can take some control over their work and make its market value appreciation benefit them, not just the canny speculative collectors."

## Artful scheme to draw a pension

The Herald

**05/16/2005 , The Herald**

Four of Scotland's leading modern artists are among the first to join a scheme which builds pensions through the hoarding of their works.

Rosalind Nashashibi, winner of the Beck's Futures prize, Martin Boyce, Lucy Skaer and Richard Wright have signed up to an investment initiative purely for artists.

Called the Artist Pension Trust, the scheme aims not only to provide a measure of financial security in the often precarious profession of visual art but will steadily build one of the most comprehensive modern-art collections in Europe. The trust, an extension of a US scheme running in New York and Los Angeles, is invested in by artists, but not with money. Instead they give many works of art to APT over a 20-year period.

The net profits from the sale of the works in the future are then divided: a share is given to the trust accounts, a share to the artist and a share to the other artists involved in the scheme.

The trust will eventually consist of 250 leading artists, selected at the rate of about 50 per year over five years, and up to 5000 works of art.

Kay Pallister, the director of the scheme, is based in Glasgow and London. She was the curator of Zenomap, Scotland's first independent show at the Venice Biennale.

She said the scheme would bring a semblance of stability to the often shaky finances of professional artists and would also enable artists to receive some compensation when the value of their art rises over time.

The irregular and mercurial nature of the art business has traditionally made it difficult for artists to pay into a traditional pension fund, or save for the future. Their income is often erratic and channelled back into further production of art works.

For every millionaire modern artist such as Damien Hirst, there are many who live on low incomes.

"The contemporary art world is a fast-paced field, exhibitions last a few weeks and the turn-over of art works continues to accelerate, making it very difficult for artists to hold on to even one or two works per year," Ms Pallister said. "I know many artists who have sold every artwork, early on in their careers, for prices in the region of £1000 to £5000 and now within, say, seven to maybe 10 years, their profile has grown and those formative works are re-sold for 50 times that amount – without the artist seeing a penny of that appreciation.

"In the short term, emerging artists can benefit from being part of a strong collection that will build over time to be of true significance in its own right. But more importantly they can take some control over their work and make its market-value appreciation benefit them, not just the canny speculative collectors."

While any artist may apply to APT, invitation to participate in the trust follows a curatorial selection process.

The panel includes a series of gallery and museum curators, who nominate and select the artists involved to participate. There is also an international advisory panel including John Balderssari and Kiki Smith, the US artists; Michael Craig Martin, the British artist; and Jan Debbaut, the head of the Tate collection.

The art given by the artists will be stored in "museum quality facilities" and will also be available for viewing, lending and showing to suitable museums and gallery exhibits.

A specialised art-selling team will consider the best time to sell each work on a case-by-case basis.

It is envisaged that works may begin to be returned to the market anywhere between eight and 20 years from the beginning of the trust, depending on each artist's particular standing in the market.

- Phil Miller, arts correspondent

## A Retirement Plan for Artists

Art in America
The World's Premiere Art magazine

**09/01/2004 , Art in America**

A new trust has been established with the aim of providing emerging and midcareer artists with a nest egg for their later years. Called the Artist Pension Trust, the scheme is the brainchild of entrepreneur Moti Shniberg. It was launched under MutualArt, which is headed by Shniberg along with Dan Galai, a hedge-fund manager and finance professor at Hebrew Universitym and David A. Ross, former director of the Whitney Museum and San Francisco Museum of Moder Art. Serving on the advisory board are artists John Baldessari and Kiki Smith, art historian Irving Sandler, dean of Columbia University's Graduate School of Fine Arts Bruce Ferguson, Morgan Stanley executive and art collector Raymond McGuire, and Wharton School Professor Jerry Wind.

Over a 20-year period, each artist will invest 20 works, which will be made available for museum shows or kept in storage. The works will sold when the return looks most promising for a given artist, with 40 percent going into the artist's private retirement account, 40 percent going into a group fund divided among all the members, and 20 percent to MutualArt. The planners predict that the value of works in the fund will appreciate, with the payout for individual artists ranging from $500,000 to $1.5 million. The estimate is based on the funds projected overall value and the proportionate work of each artist's work.

In addition to a West Coast fund in the works, plans call for a series of trusts to be established in international locales, such a London (serving Western Europe), Berlin (for Eastern and Central Europe) and Asia and South America. A selection committee of artists and art professionals will meet quarterly to select new artists for the trusts. Among the 22 individuals currently participating in the New York trust, which serves the East Coast, are Sebastiaan Bremer, William Cordova, Jules de Balincourt, Anthony Goicolea, Chloe Piene, Aida Ruilova, Zak Smith, and Kehinde Wiley. The selection committee for New York, directed by art advisor Pamela Auchincloss, includes Ross, curators Clarissa Dalrymple and Simon Watson, and dealers Jeffrey Deitch and Jack Tilton.

Each fund will eventually have 250 artists, with about 50 added each year. There are no age limits, but most artists will be under 40 so that they will be likely to fulfill their 20-year commitment.

The McGraw-Hill Companies
BusinessWeek online

October 11, 2004
By Adam Aston

# The Best of What's New

Innovation is that rarest of prizes, often elusive and always difficult to conjure up. Yet we live in innovative times, with new wonders regularly surprising and even delighting us. We have assembled a set of ideas that will soon affect everyday life. Some of these innovations apply clever ideas in a novel way. Carmakers are betting big on fuel cells, but small versions of these chemical power plants are likely to perk up your cell phone first. Other innovations transform old ideas with a smart twist. Think about the roof over your head: By adding a layer of living plants, builders are enriching the environment and cutting energy costs. Or consider that young artists don't know who among them will succeed or flop. Financial engineering to the rescue: Now, they can share the risks by contributing some works to a trust that will sell them years later and split up the profits. Like great art, the best innovations just jump out at you.

## Risk A Scheme for Starving Artists to Hatch a Nourishing Nest Egg

AT 28, ZAK SMITH IS A SUCCESSFUL ARTIST. His frenetic pieces go for $8,000 a pop. But even if buyers suddenly go cold, art will sustain him, thanks to a clever bit of risk-sharing that could have uses in other fields. Smith is among what will eventually be 250 young New York artists, chosen by an expert panel, who are pooling some of their works in Artist Pension Trust. Created by an entrepreneur, an economist, and a former museum director, the program banks on the fact that some of the artists will hit it big, raising the value of the trust. Each member contributes 20 works over two decades, mostly in the early years. Half the payments, which start at retirement, come from sales of the artist's own works; the rest come from the shared sales of the other artists in the trust. That way superstars are rewarded, and slow sellers aren't left out.

75th ANNIVERSARY ISSUE

The McGraw-Hill Companies

# BusinessWeek

EUROPEAN EDITION / OCTOBER 11, 2004

www.businessweek.com

# THE

# ECONOMY

SPECIAL REPORT The technologies and new ideas that are changing the world

## PLUS Voices of Innovation

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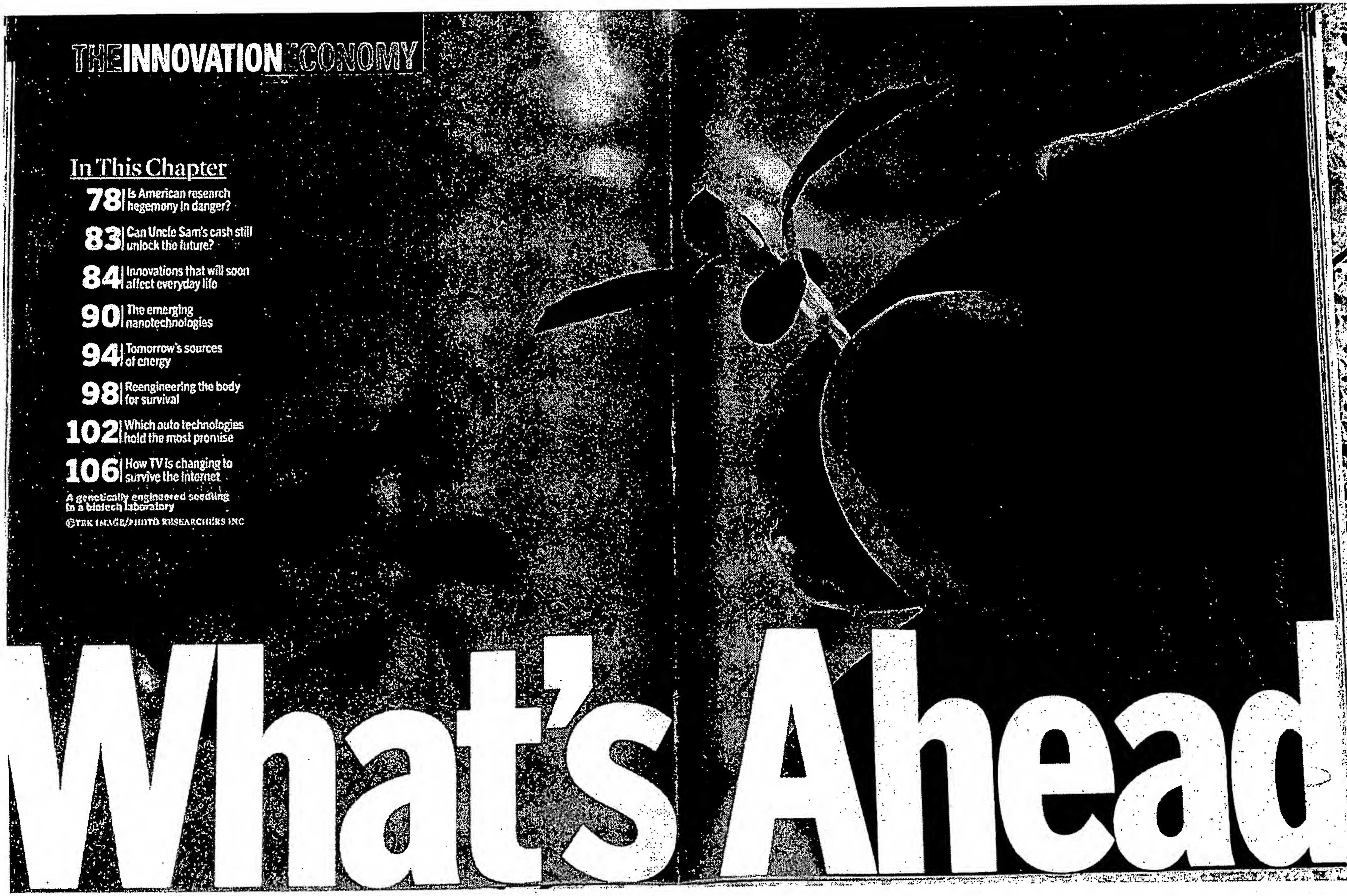


## In This Chapter



A genetically engineered seedling in a biotech laboratory

©TEK IMAGE/PHOTO RESEARCHERS INC

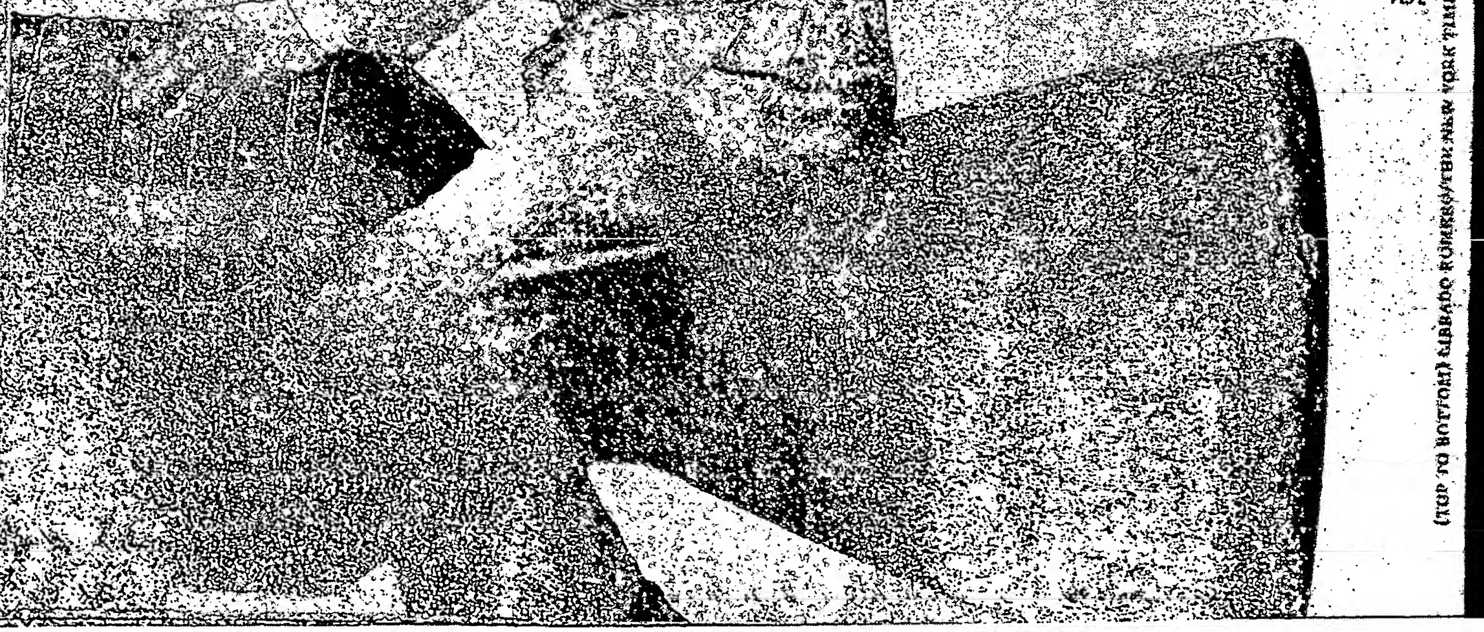
# What's Ahead

# What's Ahead

## Space Please Have Your Boarding Pass Ready At the Launch Pad

SPACE TOURISM WILL BE A multibillion-dollar industry, predicts aerospace engineer and entrepreneur Burt Rutan. Of course, he has reason to be optimistic: In June, Rutan's SpaceShipOne became the first privately developed plane to rocket into space. At press time, Rutan and his sugar daddy, Microsoft co-founder Paul Allen, were hoping to pull off two or three repeats in quick succession. That would show that space planes could operate more like airliners than NASA's shuttles.

In fact, a space-tourism company is now in the works. Using Rutan's technology, Britain's Virgin Group is branching out from passenger jets to tourist rocket planes. The new venture, called Virgin Galactic, plans to launch its first flights in 2007. Virgin predicts initial flights will cost $190,000, including three days of pre-flight training. Surveys by the space industry show that at least half of Americans would like to see the Earth from space—if they could afford it. By 2015, competition could trim the price to $15,000. The Space Frontier Foundation, an industry group, is aiming for even less, maybe $5,000. —O.P.



## Risk A Scheme for Starving Artists to Hatch A Nourishing Nest Egg

AT 28, ZAK SMITH IS A SUCCESSFUL artist. His frenetic pieces go for $8,000 a pop. But even if buyers suddenly go cold, art will sustain him, thanks to a clever bit of risk sharing that could have uses in other fields. Smith is among what will eventually be 250 young New York artists, chosen by an expert panel, who are pooling some of their works in Artist Pension Trust. Created by an entrepreneur, an economist, and a former museum director, the program banks on the fact that some of the artists will hit it big, raising the value of the trust. Each member contributes 20 works over two decades, mostly in the early years. Half the payments, which start at retirement, come from sales of the artist's own works; the rest come from the shared sales of the other artists in the trust. That way superstars are rewarded, and slow sellers aren't left out. —A.A.

(TOP TO BOTTOM) LIBRADO ROMERO/THE NEW YORK TIMES; ALAN LEVENSON.COM

: of Le Jazz au Bar, a nightclub on South
et in Manhattan. It led to a tiny dressing
n, where Ruth Brown, the rhythm and
s legend, was receiving fans after the
concert of her first extended stay at a
York club in five years; the show runs
Aug. 1.

oom was cramped. Sequined dresses
the door, an old couch was stuffed
a corner, and there was not much space
anything else. It was noisy, though.

I think about you so much!" Ms. Brown
l to the first person in line: Dick
"When I see you on television, I say,
ck! I'm here! I'm alive!'"
avett said dryly: "You know when
I see me on television? Every time any-
ly dies, it turns out I had them on my
w. Jack Paar, Bob Hope...."

Ms. Brown turned her attention to Mr.
vett's wife, Carrie Nye, but he kept listing
mes to himself. As the three talked, the
nversation was liberally punctuated with
e names of the dead: Charles Mingus, Joe
lliams, Ray Charles.

"Ray called me and said, 'I'm doing this
ovie,'" Ms. Brown said, recalling one of

Richard Termine for The New York Times

Ruth Brown performs at Le Jazz au Bar, to the delight of her longtime fans.

her last conversations with Charles, an old band mate. "He said, 'Who do you want to play you?' And I said, 'Halle Berry, you crazy fool!' He said, 'I ain't that blind.'"

Though her fans were straddling to find room, Ms. Brown was sitting in a chair, as she had throughout the concert. For the past few years she has not been able to stand up for very long without a cane, and now she performs sitting down. This goes back to 1948, when she broke both her legs in a car accident on a trip to New York. She ended up

Continued on Page 5

PARIS, July 16 — Early in his career as a conductor, James Conlon was given a sobering warning. "Americans prefer Europeans, and Europeans prefer Europeans," he was told. "You have to be twice as good to get half as far." Unfazed, he set about mastering his trade, and years later the investment paid off: as top musical posts came open in Rotterdam, Cologne and Paris, Europeans preferred this American.

Now, after two decades of work centered in Europe, including most recently nine years as chief conductor of the Paris National Opera, this expatriate New Yorker is heading home. A stocky and energetic 54-year-old, he says that he feels wistful about leaving Paris, but that he is happy to trade administrative duties for the freedom of wandering America (and occasionally Europe) as a guest conductor. An American tour this spring took him to New York, Boston, Los Angeles, Cleveland and Cincinnati, giving him a taste of things to come.

"I went to seven orchestras in eight weeks," he said. "I go and rehearse, I make own. In Paris I'd do 'Tristan' one night and be up at 9 the following morning to audition 90 violinists." His last appearance here was conducting "Otello" at the Bastille Opera on July 6.

In an interview in a Left Bank cafe shortly before packing his bags, Mr. Conlon spoke so passionately about his new freedom that it seemed churlish to suggest that he would now also be available to fill top orchestra and opera posts in the United States. He insisted this was not his purpose.

"If I decide now never to take another orchestra or opera house, I can probably work until I am 75 or 80 as a guest conductor," he said. "That's an option. Pierre Boulez has done it. I cannot honestly tell you when and if I am going to take on anything else. I have no idea. There's a notion that it's everybody's ambition to head an orchestra. I've been doing that for an awfully long time. I don't mind a break, a very long break."

Yet one of Mr. Conlon's assets is his management experience. He was music di-

Continued on Page 6

# New Pension Fund Seeks to Give Struggling Artists a Taste of Long-Term Stability

By JULIE SALAMON

Simone Shubuck didn't find working in er Lower East Side studio without a bathoom a bit romantic. Actually, she found it weird that visiting dealers and collectors always declared her bohemian deprivation 'absolutely charming." As time passed, Ms. Shubuck, now 34, found herself yearning for prosaic luxuries like a toilet, health insurance, a pension plan.

"A 401(k), having taxes taken out, things other people don't have to think about," she said wistfully. "As you get older it's hard to live without that kind of stuff."

SoHo galleries have long since given way to pricey shoe stores. Art has merged with fashion, media and real estate in bottom-line reckoning, and it's hard for artists not to think about money. Now the commodity-trading mentality of the art investment world has produced a scheme intended to assure artists like Ms. Shubuck some long-term financial stability — while making money for investors.

The Artist Pension Trust invites up-and-coming artists to contribute 20 pieces of their work to a tax-protected fund over a 20-year period on the theory that some of the art will appreciate significantly. All the artists will share the profits, even if their initial promise never translates into increased value.

"It's a way of taking advantage of the capitalistic nature of the market and mix in a healthy dose of socialism to create a hybrid form," said David A. Ross, the former director of the Whitney Museum of American Art and then the San Francisco Museum of Modern Art, who is the Artist Pension Trust's president. "It will allow artists who do well to profit from those works when they do really well and at the same time allow those artists whose work never gets beyond the $10,000 level to rest more easily knowing that a carefully selected group of peers are pooling resources to present them all with a retirement income."

Socialist inclinations aside, the trust isn't meant to be altruistic. Its founders hope to establish trusts in 10 cities, including New York, Los Angeles, Beijing and Tokyo, with 250 artists participating in each. The invest-

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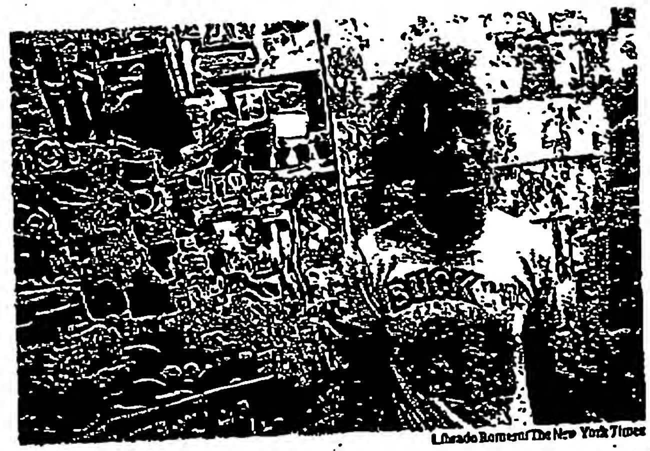

Librado Romero/The New York Times

Zak Smith, one of the participants in the Artist Pension Trust, in his studio in Brooklyn.

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# houting to Catch a Fox

Sharon Stapleton for The New York Times

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**OUTFOXED**

Produced and directed by Robert Greenwald; directors of photography, James Curry, Will Miller, Glen Pearcy, Richard Pérez, Luke Riffle, Bob Sullivan and Eugene Thompson; edited by Jane Abramowitz, Douglas Cheek and Chris Gordon; music by Nicholas O'Toole; released by the Members of MoveOn.Org and the Center for American Progress. Running time: 77 minutes. This film is not rated.

ghost of Joseph Welch would enter the studio and inquire, at long last, after Mr. O'Reilly's sense of decency. But those days — when Welch undid Senator Joseph R. McCarthy on live television, and when that medium was new enough to bring a promise of transparency and truth-telling into the public consciousness — are long past.

Mr. O'Reilly's fans are about as likely to watch "Outfoxed" as the patrons of that bar in Williamsburg are to tune in to "Fox & Friends." For the foreseeable future, there will be more shouting, finger-pointing and tuning out, as each side accuses the other of bias, distortion and dishonesty.

Somehow, though, in these confusing circumstances you can catch a glimpse of the truth, even in a bar in Brooklyn on a muggy Sunday evening in July.

# New Pension Fund for Artists Provides a Taste of Stability

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ors will receive 20 percent of the trust's income, and the rest will be divided among the artists, but not equally. Individual artists will receive half the appreciation in their work; the rest will go to less successful colleagues.

The appeal is obvious in a profession where, despite a booming market, most practitioners are lucky if bartenders will accept drawings for drinks, or the bartenders and other collectors get hold of the early work and the artists discover later that they forgot to invest in themselves.

"There are tons of extremely well-known artists who are practically destitute," said Kiki Smith, 50, an artist who is one of the trust's advisers. "Most artists live with tremendous insecurity about their future in terms of money. It's like being in a free fall their whole lives." She speaks from experience. Her father, Tony Smith, was a leading sculptor in the 1960's yet lived on the margins financially. As a result, she said, "The second I started to make money I put money away for retirement."

Ms. Shubuck, the Lower East Side artist, said she was honored to be asked to be part of the trust. "I haven't had a solo show yet, so for someone to project long-term value on my work was exciting," she said. This has been a milestone year for her. After 10 years of paying the rent in New York by doing the flowers at Babbo and Felidia, she will have her first one-woman show in September, at the LFL Gallery in Chelsea. Recently she moved into a studio with a bathroom. And now, prospects of a pension.

The Artist Pension Trust was conceived by Moti Shniberg, an Israeli entrepreneur in his early 30's who noticed that his artist friends had no money, even when their paintings were selling for $5,000 to $10,000 apiece. He brought the idea of a barter-based pension fund to Dan Galai, a finance professor at Hebrew University in Jerusalem and an investment banker. Mr. Galai has taught at U.C.L.A.; the University of California, Berkeley; and the University of Chicago but is best known as the creative force of an arcane art form, the Chicago Board Options Exchange's VIX volatility index, which tracks changes in options based on the Standard & Poor's 500 index.

He happens to collect art, too, though Mr. Shniberg didn't know that. "I like many artists, and I could identify with many of the issues he raised," Mr. Galai said. "We did a lot of calculations and made some assumptions. Some of the artists will stop painting and become stockbrokers, some will be very successful and decide not to make contributions after five years." He figures the payout for most participants will be $500,000 to $1.5 million after 20 years.

The plan offers a clinical view of the integral bond between art and money. "It's about identifying talent but also speculating on talent," said Pamela Auchincloss, a former gallery owner and head of an arts management company, who is director of the first Artist Pension Trust, in New York. "Our job is to collect and manage and to take an interest in the career development by facilitating museum loans."

It's a complicated process requiring the flash and dazzle of exhibition and promotion but also the painstaking work of storing and conserving. "Our decision-making process is close to that of a collecting museum but not quite," Mr. Ross said. "We're not making decisions for all time. It's more like getting engaged than getting married."

The selection committee for the New York trust includes prominent art dealers and curators and Mr. Ross, the former museum director.

"We are looking for more than just talent and quality, but also an evaluation that these artists have promise, the long-term ability to sustain their career," he said. Though there are no age limits, he said, the artists will tend to be under 40 so they can fulfill their 20-year obligation.

An initial group of 20 artists has been chosen by the selection committee, but now artists can apply directly through the trust's Web site at www.artistpensiontrust.org.

Zak Smith, a 28-year-old artist whose "Pictures Showing What Happens on Each Page of Thomas Pynchon's Novel Gravity's Rainbow" was featured in the 2004 Whitney Biennial, explained why he agreed to participate. "I did this because it's a very small commitment," he said nonchalantly. "You haven't got much to lose, so why not?"

Mr. Smith, who said he earned about $25,000 last year, lives in the Bushwick section of Brooklyn in a four-room railroad flat with a roommate. His paintings usually sell for about $7,000, though the piece shown at the Whitney is priced at $40,000. "I'm not living the glamorous life, and I don't plan to," he said. "That's my real retirement plan. Not to spend all my money."